In the Supreme Court of the United States.

A. J. KIZER, *Plaintiff in Error.*

vs.

TEXARKANA & FORT SMITH RAILWAY CO., *Defendant in Error.*

Brief of Defendant in Error.

As an apology for the brief discussion of the question herein, we beg to state that the clerk of this Court informed us, in a letter dated September 15, 1900, that this case would be called about December 1, and in a letter dated October 25, 1900, that said case would be called the latter part of the week beginning December 3, 1900. On November 6, 1900, we received a telegram from the clerk notifying us that the case would probably be called on Monday,

November 12. We were on that day engaged in the preparation of our brief, relying upon the clerk's letters as to the time when same should be filed. As we have not time to discuss the subject fully, we merely state the points upon which we rely and cite the authorities to sustain the same.

The plaintiff in error has not made a full statement of the facts, circumstances and conditions surrounding the execution of the contract upon which this action is based. Said contract shows, on its face, that Kizer had already determined to locate his mill at Rankin, Arkansas, and had selected the site for the mill. The first clause of the contract states that fact. Said Kizer is not, therefore, in a condition to contend that he was led to locate his mill at Rankin by reason of the execution of the so-called contract. The said contract was signed September 16, 1891. At that time the appellee's road was built to a point within ten miles south of Rankin, and was in course of construction to Rankin and northward. It was completed to Rankin in December 1891, only a few months after the alleged contract was signed. Kizer knew, at the time he obtained the alleged contract, that the road would be built to Rankin, and he had already bought lands and obtained options on other lands in that county, from which he expected to obtain timber for use in his mill.

The railroad company, at the time of the execution of said contract, was an interstate common carrier. It extended into the states of Texas and Arkansas. There were al-

ready located on said railroad four sawmills; one at Wilton, one at Ashdown, one at Ogden, and one at Corbin. These mills were in operation and were shipping lumber over the appellee's road, at the published and established rates as shown by the record. Prior to November 30, 1892, the appellee did not have a published rate sheet, separate and apart from other roads in connection with which it was doing business. Each of the railroads leading out of Texarkana published a rate sheet including all stations on appellee's road. These rate sheets were published at appellee's stations, and were the regularly established rates of appellee. Up to that date appellee charged only two cents per hundred weight from all stations on its line to Texarkana. The other roads above mentioned refused further to carry their rate sheets in that manner and refused to give the appellee the prorate of two cents more and therefore the appellee elected to publish a tariff rate of its own. After due notice that was done. That tariff established a rate of three cents to Texarkana, instead of two cents, as previously established. On all other roads leading into and out of Texkrkana, a charge of five cents per hundred weight for five miles and under was the usual, reasonable and regularly established charge. Two cents was less than the appellee could carry the lumber to Texarkana for. It was enabled to carry it at that rate by reason of a prorate allowance from the other roads. When the other roads declined to allow it that prorate it of course was compelled to establish a rate of its own.

The alleged contract was made under rather singular, and in a sense, suspicious, circumstances. There were at least four competitors of the plaintiff in error located on the same line of road at the time. William Buchanan was a director in the company. The plaintiff's father-in-law was also a director in the company and it was the express understanding between these directors and the plaintiff, who afterwards became agent of the appellee, that these three parties, including the two directors and appellee's agent were to become the sole owners of the mill mentioned in the contract and were to receive the benifits of said contract. This was the agreement at the time the contract was signed. For reasons best known to themselves, Buchanan and Estes, the disectors, did not participate in the building of the mill. From the time that appellee's road reached Rankin until November 30th, when the new schedule of rates was put in force, every shipper was charged the same rate, to wit, two cents. After that every shipper was charged the same, to wit, three cents per hundredweight. The plaintiff being located at the north end of the railroad at that time had an advantage over all the others, as he obtained a longer haul than any of the others for the same rate. The alleged contract was in fact never delivered to the plaintiff in error, as it remained in the possession of William Buchanan, one of the directors of the road.

The testimony also shows that the present company never had any notice of any nature as to the existence of any such contract. The testimony also fails to show that the

President, Whittaker, had any authority whatever to execute such a contract. The plaintiff introduced no testimony to show any authority. The answer denied the execution of the contract and denied the authority of Whittaker to sign the same and denied the delivery of the contract. (*See* answer, pages 17 to 19.)

Upon the state of facts disclosed by the record our contentions are as follows:

I.

The Supreme Court of Arkansas as well as the lower Court, should have held that there was no authority for the execution of the contract. The facts in the record fail to disclose any authority and there is no presumption of law that the president had the authority to make any such contract.

1. *Elliott on Railroads, Sec. 283 and authorities there cited.*

II.

Said contract was never delivered to the plaintiff, and was therefore, never executed. It was left in the possession of William Buchanan, one of the directors, and therefore the absence of any intention to make it the contract of the company fully appears.

Clark on Contracts, page 127.

III.

The alleged contract is not in truth a contract. The same is wanting in mutuality.

Clark on Contracts. page 165, et seq. and authorities there cited.

There was nothing binding on the plaintiff to build the mill at Rankin and the road could not have maintained an action against him for his failure to do so.

IV.

The contract is also void for want of any consideration to support it. The first section of said contract attempts to bind the plaintiff to build a sawmill at a point already selected by him. That is the only undertaking set out in that part of said contract. In consideration that he should build said mill, the railway company agrees to furnish him cars and ship his lumber at a rate not to exceed two cents per hundred pounds. If there is any agreement in that part of the contract at all, binding on the railway Company, it is that said company agreed to do that which the law compels it to do. The railway company is a common carrier and is compelled by law to furnish cars and transport goods of all people at rates which are the same to everybody. Said railway company was therefore, bound, under the law, to do the very thing which it agreed to do in said section two of said contract. It could do no more and it could do no less. As to the rate of two cents, if that was the regularly established rate it could charge that if it charged the same to everybody else. There is therefore nothing in the contract. It is a well established principle of law that where a party agrees to do a thing which he is already bound to do such agreement furnishes no consideration upon which a contract may be founded.

Clark on Contracts, p. 184,
Killough vs. Payne, 52 Ark., 147,
3 Amer. and Eng. Enc. of law, p. 832 and note 4.
Thompson vs. Robinson, 34 Ark., 52 and authorities,
1st Parsons on Contracts, p. 429,
Worthen vs. Thompson, 54 Ark., 152,
Vestel vs. Knight, 54 Ark., 100.
Blakefield vs. Halpern, 53 Ark., 345,
Hallett vs. Spratlin, 54 Ark., 185
Jenkins vs. Shinn, 55 Ark., 347,
Gaar vs. Green, 68 N. W. R., 318,
Moran vs. Peace, 71 Ill. App., 135,
Spencer vs. McLain, 50 N. E. R., 769.

V.

For the reasons above stated the Circuit Court of Little River County, and also the Supreme Court of Arkansas, should have held the alleged contract void and should have decided the case in favor of the railway company on the grounds above mentioned, and, therefore, there is no Federal question involved in the controversy and for that reason the appeal should be dismissed, as the decision should have been upon other grounds than that of a Federal question. The writ of error should now be dismissed.

Harrison vs. Morton, 171, U. S., 39.
Castillo vs. McConnico, 168 U. S., 674.
Rutland R. Co. vs. C. V. R. Co., 159 U. S., 630.

But if the Court should be of the opinion that we are in error in the above contentions. then we submit that the contract is void because prohibited by the Interstate Commerce Act. The second section of that act provides: "That if any common carrier, subject to the provisions of this act, shall directly or indirectly, by any special rate, rebate, drawback or other devise, charge, demand, collect or receive from any person or persons a greater or *less* compensation for any services rendered or *to be rendered* in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneus service in the transportation of a like kind of trafic under substantially similar circumstances and conditions, *such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and decleared to be unlawful.*" The same law makes it a crime for any common carrier to charge one person either more or less than another under the conditions above mentioned. The appellee is subject to the provisions of this Act. *It was subject to those provisions on the date of the contract mentioned.* It then existed in two states and was transporting persons and property from one to the other. Said act therefore applies with all its force to appellee. To carry out said contract would, therefore, be a crime both on the part of the appellant and the appellee.

So for as the facts are concerned, they are found against the appellant by the court below. It can not be just for the

railroad company to transport, for Kizer, lumber at less than cost, and to transporrt it for other people at a profit. If any contract can be in violation of said interstatate commerce law this one is. The Court found as a fact that lumber could not be transported except at a loss, at a two cent rate at the time that this contract was made and afterwards, and also found that the appellee collected from all persons, including the plaintiff in error, exactly the same rates and charges at all times. The Court further found that said charges were made under the same conditions and circumstances and that no more and no less was collected from the plaintiff in error than from any of the others.

Plaintiff in error makes the argument that the contract was valid at the time it was made and therefore, notwithstanding that it afterward secured to the plaintiff an unjust discrimination over other shippers, it was not in violation of the law of the United States. In point of fact that contention is not well founded. The contract was not valid when made. All the facts in this case show that the plaintiff was attempting to secure, for himself and associates, a special privilege not granted to other shippers. It seems to have been in his mind at the time the contract was made that it would soon become necessary for the appellee to change its rates from time to time as conditions and circumstances might require. He knew that the varying phases and changes of commerce would require changes in rates. This every shipper as well as every railroad and every court knows. The plaintiff in error well knew that the two cent rate, then

inforce, could not last long, and he therefore endeavored, by the contract, to take advantage of other shippers and the public and put himself in a position where, notwithstanding his competitors would be compelled to pay a higher rate, he, by reason of an illegal contract, would not have such high rates to pay. If this was not his intention, then what could it have been? He certainly would not have tried to provide against a lower rate. The object in entering into the contract was that he should avoid a necessary advance of rates. The railroad company had the right to raise the rates. That is conceded by everybody. Kizer contends that his contract was valid when made because that was the rate at that time, and his counsel commend his foresight in making such an advantagious contract to last for five years. To prevent such contracts was one of the objects of the Interstate Commerce law. If Kizer or other shippers can, when rates are low, make contracts binding the railroad company to that low rate for a term of years, then the Interstate Commerce law is a farce and the Interstate Commerce Commission might just as well close its doors and retire from business.

When this contract was made the railroad was doing interstate business. It was at that very time shipping lumber from other mills near the plaintiff in error, out of Arkansas and into Texas and other States. Plaintiff in error knew that the rate was two cents. The road knew it and the Directors knew it. His prospective partners, Buchanan and Estes, also knew it. All of them knew that the railroads at Texarkana had the absolute right to

withdraw from the agreement at any time and that if that agreement was withdrawn it would be necessory to advance the rates. To provide against such reasonable and fair advance of rates as against him, the plaintiff in error, through his influence with the directors and the president of the railway company, secured this unjust and unfair contract and now insists that it was valid when made. It is against just such contracts, as stated above, that the Interstate Commerce law was leveled. Plaintiff in error contends that the railroad company carried this contract out for one year and then abandoned it. The evidence doee not establish that fact. The railroad company charged the plaintiff the same rates that it charged all others from the beginning. It therefore appears that the contract had nothing to do with the matter whatever. It seems never to have been recognized at any time or by any body. The evidence fully establishes this point.

It is conceded in this case, and not denied by plaintiff in error, in his brief that the rate of three cents was a fair, reasonable and just rate. It is not denied that the railroad company could not carry the lumber for less than four cents. The plaintiff's position is that he had a right, under the Interstate Commerce law, to take advantage of a low rate, on account of conditions existing at Texarkana, and bind the railroad company to that low rate, notwithstanding he concedes the right of the road to raise the rate as to all the other shippers. It was right that the rates should be raised It was the duty of the road to raise them. It had the right,

under the law, to do so. It pursued that law and raised the said rates in accordance with that law. There is no provision in the law for the plaintiff to make such a contract and escape the raise of rates.

Counsel for plaintiff in error forget every interest except that of the plaintiff, in their argument. They forget that the public is interested in the operation of railroads. The public, as shown by the authorities hereinafter cited, is as much interested as any individual shipper. It is a wrong to the public that Congress is guarding against. It is an effort to put down monopolies and unfair discriminations. If the railroad company had the right and power to make this contract with the plaintiff then it had the right and power to make a twenty-cent rate. Will the plaintiff admit that a twenty-cent rate would have been binding, when the railroad was at the same time charging all other shippers a three-cent rate? If the railroad company and the plaintiff had the right and the power to make a rate of two cents then they had a right and the power to make one for thirty cents. If one is binding the other would be also. Both would be in the very teeth of the Interstate commerce Act, and would therefore be null and void.

Said contract, was, therefore, invalid when made and never was valid. It was never recognized by the railroad company and was never attempted to be carried out by it. It is true that for more than a year the railroad company charged two cents but at the same time it charged all other persons the same.

That such a contract is absolutely null and void we cite the following authorities:

Addyston Pipe and S. Co. vs. U. S., 20 Supt. Ct. Rep. 96,

Bullard vs. N. Pac. R.R. Co., 45 Am. & Eng. R. R? Cases, ## 234

s. c., 11 L. R. A., 246;

C. R. I. & P. Ry? Co. vs. Hubbell, (Kan.) 38 Pac. Rep., 266,

Briske, vs. N. C. St. Ry. Co., 82 Ilt. App., 256.

Sou. Wire Co. vs. St. L. B. & T. Co., 38 Mo. App., 194,

Hawley vs. K. & T. Coal Co., (Kan.) 30 Pac. Rep., 14,

Kates vs. A. B. & C.Co.,(Ga.)34 S. E. R., 372.

Messenger vs. P. R. R. Co., 36 N. J. L., 407,

s. c., 37 N. J. L., 531 and 13 Am. Rep. 457.

Scofield vs. Lake Shore, etc., Ry. (Ohio), 3 N. E. R., 907,

s. c. 23 Am. & Eng. R. R. Cases, 612.

Sanford vs. R. R. Co., 24 Pa. St., 383,

McDuffie vs. P. & R. R. R. Co., 52 N. H., 430.

Fitzgerald vs. Fitzgerald Mallory Co. (Neb.) 59 N. W. R. 862.

State vs. C. W. & B. Ry. Co. (Ohio) 23 N. E. R., 929.

Raleigh & G. R. Co. vs. Swanson (Ga.) 28 S. E. R. 602.

s. c. 39 L. R. A. 256.

In Re Grand Trunk Ry., 2 Int. Com. Rep. 207.

In Re Tariffs of the trans-continental lines, 2 Int. Com. Rep. 685.

Reynolds vs. W. N. Y. & P. R. Co., 1 Int. Com. Rep. 76.

Fitzgerald vs. Grand Tr. Ry. Co. (Vermont) 22 At. Rep. 76.

None of the authoritios cited by plaintiff in error hold that a railroad company may make a contract such as that upon which this action is brought. In all of them the principle is recognized fully by this court and others that there can be no discrimination.

For the reasons above indicated and for the reasons set out in the authorities above cited we submit that the decision of the Supreme court of Arkansas should be affirmed.

Respectfully Submitted,

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